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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 91.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,
Appellant,

v.

ELIAS B. WILCOX,
Appellee.

APPEAL FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF FOR ELIAS B. WILCOX, Appellee.

JOSE R. F. SAVAGE,
BEN A. MATTHEWS,
Solicitors for Appellee.

PRESS OF FREMONT PAINE, 60 Washington Street, New York City.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 91.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,
PLAINTIFF-APPELLANT,

v.

ELIAS B. WILCOX,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AND ARGUMENT FOR DEFENDANT, APPELLEE.

This case originated in the local District Court at San Juan and was removed to the District Court of the United States for Porto Rico, where a foreclosure decree was entered against defendant. He appealed to the Circuit Court of Appeals for the First Circuit, and secured a reversal. From the decree of reversal this appeal is now prosecuted by the plaintiff Bank.

For convenience the parties herein will be referred to as the Bank or plaintiff, and Wilcox or defendant.

After the case was docketed in this Court, Wilcox moved to dismiss for want of jurisdiction. The Court having postponed consideration of the motion to the hearing on the merits, the question of jurisdiction will again be argued in this brief, which will include for convenience the matter already set forth in the printed motion papers. This argument is set forth at page 12, *infra*.

The other questions presented by the record will then be discussed, but first, to simplify the argument and make clear the circumstantial significance and relation of the several items of proof there will be set forth an outline or

Statement of Facts.

The facts out of which the action arose are stated chronologically.

In July, 1909, Rafael Lopez Landron, an attorney, and his wife, Ana Maria Gutierrez Igaravidez, were the owners of a certain piece of property in the City of San Juan, Porto Rico. On July 29, 1909, they executed a mortgage to El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, the plaintiff-appellant herein, to secure the payment of the principal sum of $4,600 and interest thereon at the rate of one per cent. per month for the term of one year, the interest to be payable every four months in advance, and the entire mortgage to become due upon the failure to pay any installment of interest. This mortgage also included the additional sum of $500 to cover attorneys fees and judicial expenses in the event of foreclosure.

Prior to June 12, 1912, Elias B. Wilcox, defendant-appellee herein, was a member of the law firm of Sweet & Wilcox, which firm prior to that date recovered a judgment for $1,163.35 in the District Court of the

United States for Porto Rico against Rafael Lopez Landron. To satisfy this judgment Landron gave to Sweet & Wilcox eleven promissory notes, without interest, for $100 each payable on the 12th day of July, August, September, October, November, and December, 1912, and January, February, March, April and May, 1913, and a twelfth note for $63.35 payable June 12, 1913, without interest. The payment of these notes, and of the sum of $300 to cover foreclosure costs was secured by the execution by Rafael Lopez Landron and his wife, of a second mortgage covering the same property, in favor of Willis Sweet and Elias B. Wilcox. This mortgage was executed on June 12, 1912, and recorded on July 26, 1912. It recited the existence of the first mortgage of $4,600 in favor of the Bank, and provided that should the debtor fail to pay any one of the notes within 30 days after date of maturity, the remaining installments should be considered as due, and the creditors would be entitled to foreclosure for the balance remaining unpaid.

The debtor failed to meet any of the notes secured by this second mortgage, and on September 6, 1912, Willis Sweet and Elias B. Wilcox brought a suit in the United States District Court for Porto Rico against Landron and his wife to foreclose this second mortgage.

On December 3, 1912, the day before entry of final decree in this suit, without the knowledge of Wilcox, a third mortgage was given by Landron on the same property to the Bank. This mortgage was for $1,700 with interest at 12%, payable every four months in advance. Notwithstanding the foreclosure proceedings, for some unknown reason, this mortgage was not recorded by the Bank until January 28, 1913, and Wilcox did not learn of its existence until after that time.

Final decree was entered in the foreclosure suit on December 4, 1912, and a notice of sale, dated January

7, 1913, was prepared by the Master appointed to sell the property, wherein the sale was announced for February 5, 1913. This notice was never published, nor was any sale of the property held under the decree (Return of the Master, R. p. 25) for these reasons:

Mr. Damian Monserrat, a Lawyer and Notary of San Juan, and also the President and a stockholder of the Bank, called on Mr. Wilcox before the notice of sale was published, and suggested that some way might be found to settle the matter so as to save Mr. Landron the humiliation of having his property advertised for sale. Wilcox, Monserrat and Landron were all lawyers, and Monserrat said this was an ugly thing between lawyers. Monserrat suggested that Landron would be willing to transfer the property to Sweet & Wilcox in satisfaction of their judgment, and asked Wilcox to go to Landron's office to discuss the matter. Wilcox, accompanied by one F. C. Timpson, went to Landron's office at the time set. Landron, Monserrat, Wilcox and Timpson were present at the conference. It was there agreed that Wilcox would take a deed of the property from Landron in satisfaction of the Sweet & Wilcox judgment, and that he would assume the mortgage indebtedness on the property that appeared from the books of the Registry as recorded prior to the date of the mortgage given by Landron to Sweet and Wilcox. It was further agreed that all expenses of the transfer should be paid by Landron, and that the latter within thirty days might repurchase the property upon payment of the amount of the Sweet & Wilcox judgment, plus five hundred dollars and the costs of the new transfer, and, finally, that if Landron did not so repurchase he would vacate the premises at the end of the thirty days, paying as rental for that term the interest for that time on the mortgage held by the Bank on the property. They agreed to reduce this to writing.

Nothing was said at this interview as to the existence of any mortgage other than the first mortgage for $4,600 recited in the mortgage to Sweet & Wilcox. The written agreement, dated January 13, 1913, signed by Wilcox and Lopez Landron, was offered in evidence, but excluded by the Trial Court. It reads as follows (pp. 52-53 of the transcript):

> "This agreement entered into on this the 13th day of January, 1913, in San Juan, P. R., between Rafael Lopez Landron, representing himself and as attorney in fact for his wife, as the party of the first part, and E. B. Wilcox as party of the second part, witnesseth:
>
> "(1) That the party of the first part contracts to sell to the said E. B. Wilcox, the house and lot situated on Park or Tren Street in Santurce, San Juan, in which the said party of the first part lives with his family, which said house and lot is more particularly described in a certain mortgage given by the party of the first part and his wife to the members of the law firm of Sweet and Wilcox upon said house and lot, bearing date of June 12th, 1912, being made before Hugh R. Francis, being No. 6 of the Protocol of said Francis; said party of the first part agreeing to sign the deed of sale for himself and wife as soon as the same may be ready for signing.
>
> "(2) It is further agreed that the price of the said house and lot shall be that amount for which appears in a certain judgment rendered by the Judge of the United States District Court for Porto Rico against the said Rafael Lopez Landron and his wife in favor of the said Willis Sweet and E. B. Wilcox, as members of the late law firm of Sweet and Wilcox, it being understood that the sale and

transfer of the above named property is to satisfy the said judgment and the said E. B. Wilcox agrees to cancel the said judgment upon the signing of the said deed of sale as above provided.

"(3) It is further agreed that the said Wilcox shall assume the incumbrances now existing against the said property which are duly registered in the Registry of Property which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of the said Sweet and Wilcox.

"(4) It is further agreed that any—all expense incident to the preparation of the deed of sale, stamps, etc., shall be paid by the party of the first part.

"(5) It is further agreed that if within thirty days from the date of this agreement, the party of the first part shall so desire, he may within the said thirty days, repurchase from the said E. B. Wilcox the above named property by paying for the same the amount named in the judgment referred to given by the Judge of the U. S. Court together with the sum of Five Hundred Dollars in addition thereto, it being understood that all expenses necessary in connection with the resale of the said property shall be paid by the party of the first part in addition to the amount of the said judgment and the sum of Five Hundred Dollars just named.

"(6) It is agreed further that if the party of the first part does not conclude the repurchase of the property within thirty days named, that he shall vacate the said premises promptly at the conclusion of the said thirty days, it being further understood that during the time mentioned within which the party of the first part may repurchase the property, that he may remain living therein, provided he pays

a rental equal in amount to the interest for that time, payable to the Bank of Porto Rico upon the *mortgage held by said Bank against said property*" (italics ours).

This agreement makes no reference to the Bank's $1,700 mortgage, and refers in the singular to "the mortgage" of the Bank.

The deed was prepared by Monserrat as Notary Public, who was present when the agreement was made between Wilcox and Landron, and was executed on January 14, 1913, the day after the written agreement was signed. When Wilcox went to sign the deed at Monserrat's office he asked Monserrat if it was drawn in accordance with the agreement, and Monserrat stated that it was. Wilcox then signed it without having read it fully. The stamps for recording the deed were furnished by Monserrat to Mr. Timpson, who presented the document for record. Wilcox made one payment of interest after taking title to the property, which seemed to him high but he supposed included some back interest. Thereupon, after investigating, he discovered that the deed prepared by Monserrat, recited the assumption by Wilcox, in addition to the mortgage of $4,600, of a mortgage for $1,700 executed by Lopez Landron and his wife to the Bank on December 3, 1912, but which on the date of executing the deed from Landron to Wilcox had not yet been recorded in the Registry of Property. The existence of this mortgage was unknown to Wilcox until after he had made the payment of the interest referred to. Wilcox then refused to pay any further interest (Testimony Wilcox, R. pp. 50-56; testimony Timpson, pp. 56-62, Defendant's Exhibits A, B, C, D and E, pp. 21-34).

This unrecorded mortgage for $1,700 carried interest at one per cent. per month, payable every four months

in advance, with the additional sum of $200 to cover costs in event of foreclosure. The greater part of the principal sum of $1,700 was accrued unpaid interest on the mortgage for $4,600. The exact amount of this unpaid interest does not appear; the treasurer of the Bank testified (R. pp. 49-50) that he could not state this accurately, at least $1,480.

On June 9, 1914, the Bank filed this bill against Elias B. Wilcox for the foreclosure of the two mortgages held by the Bank, that is to say, the mortgage for $4,600 and the mortgage for $1,700, with accrued interest thereon.

On July 20, 1914, the defendant filed his answer and also a cross-complaint which set forth all the facts hereinbefore recited and the further facts that the deed executed to Wilcox and wherein he assumed the payment of the said mortgages, was null and void because Monserrat, the Notary who drew the same and before whom it was executed and acknowledged, was at the time a stockholder of the Bank holding the mortgages, as well as its President, and that one, if not both of the witnesses to the instrument were employees of the Notary, all or any of which facts rendered the instrument null and void under the laws in force in Porto Rico. Affirmative relief was prayed for.

On August 3rd, 1914, the Bank filed motions to strike the answer and the cross-bill. These motions were denied on July 28, 1915 (R. pp. 10 and 11).

On October 26, 1915, no demurrer, plea or answer having been filed to the cross-bill, Wilcox filed his motion for a decree pro confesso upon the cross-bill (R. p. 11).

On November 15, 1915, the Bank filed a motion to dismiss the answer (R. pp. 11-12) and on the same date a motion to dismiss the cross-bill (R. p. 12). The motion for a decree pro confesso on the cross-bill and the motions to dismiss the answer and the cross-bill

were heard on November 22, 1915, and the parties were given time to file briefs (R. p. 12).

On January 27, 1916, the Court denied the motion for a decree pro confesso on the cross-bill, and granted the motions to dismiss the answer and the cross-bill unless the same should be amended (R. p. 13).

An answer was filed by the defendant on March 13, 1916 (R. p. 73), and an amended answer on July 5th, 1916 (p. 17 of transcript) all under oath, answer under oath not having been waived in the bill.

The amended answer sets out all the facts hereinbefore stated with regard to the agreement between Wilcox and Landron, the preparation of the deed by Monserrat, his assurance that the same was in accordance with the agreement between the parties on which Wilcox relied, and further alleged that the execution by Landron to the Bank of the $1,700 mortgage was not made in good faith, nor for the consideration stated therein; that there existed either a deliberate fraud on the part of the Bank through its president, Monserrat, or such a mistake on the part of the said Monserrat as Notary as to nulify the said deed; it also alleges that Monserrat at the time he acted as Notary in the preparation of the deed was president, one of the principal stockholders of the plaintiff Bank and its legal representative, and that the witnesses to the execution of the deed were in his employ, and concluded by praying that the bill be dismissed, and that the deed from Landron to Wilcox be held for cancellation and declared null and void.

The cause came on for hearing before the Court on the bill, amended answer and the proofs, and on August 25, 1916, the Court entered its final decree in favor of the Bank and against Wilcox, holding the latter personally liable on both mortgages and finding in favor of the plaintiff for the sum of $9,631.93, including prin-

cipal, interest, amount provided for attorneys fees and expenses, and insurance, decreeing that the mortgaged property be sold to pay the same if the amount found to be due should not be paid within ninety days from the date of the decree (R. p. 34).

The Court filed an opinion on the facts and the law as of the same date which will be found at page 85 of the transcript.

On December 23, 1916, Wilcox filed his bill of review in the District Court of the United States for Porto Rico (R. pp. 36-45) setting forth all the facts hereinbefore stated, and also alleging that in an action begun by Wilcox in the District Court of the United States for Porto Rico against Landron and his wife for the cancellation of the deed of the property executed to Wilcox by Landron, a final decree had been entered in favor of Wilcox and against the defendants in that action (R. pp. 87-88).

On January 20, 1917, a motion was filed by the Bank to dismiss the bill of review, which was granted on February 3, 1917 (R. p. 46).

On February 24, 1917, an appeal to the Circuit Court of Appeals for the First Circuit was taken by Wilcox from the final decree of August 25, 1916, and the assignment of errors was filed (R. p. 71).

Placing the salient facts in convenient form they appear as follows:

July 29, 1909—Lopez Landron and wife executed a mortgage in favor of the Bank, for $4,600, which was recorded on May 13th, 1910 (R. pp. 80-82).

June 12, 1912—Lopez Landron and wife executed a mortgage on the same property for $1,163.35, in favor of Sweet & Wilcox (R. p. 27).

July 26, 1912—Last named mortgage recorded (R. p. 27).

Sept. 6, 1912—Foreclosure proceeding begun by Sweet & Wilcox; no payments having been made on obligation as agreed (R. p. 21).

Dec. 3, 1912—Lopez Landron and wife executed a mortgage for $1,700 in favor of appellant Bank, which was not recorded until January 28, 1913 (R. pp. 83-85).

Dec. 4, 1912—Decree obtained by Sweet & Wilcox in foreclosure proceedings against Landron and wife (R. p. 23).

Jan. 13, 1913—Written agreement made between Lopez Landron and Wilcox, under which Wilcox agreed to take over the property and to assume the incumbrances recorded prior to the date of the mortgage executed to Sweet & Wilcox, in satisfaction of that mortgage (R. p. 69).

Jan. 14, 1913—Deed of sale of property from Lopez Landron and wife to Wilcox, executed; recorded Jan. 29, 1913 (R. pp. 29-34).

Jan. 28, 1913—$1,700 mortgage recorded (R. pp. 83-85).

On December 3, 1918, the Circuit Court of Appeals for the First Circuit decreed that the deed to Wilcox was null and void and that the mortgages were uninforceable as to him (R. pp. 90-99).

Motion to Dismiss.

POINT I.

The decree of the Circuit Court of Appeals is final and the Supreme Court has no jurisdiction of this appeal.

The Bank contends that this Court has jurisdiction under Section 241 of the Judicial Code, because this is a

> "case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this Title."

Wilcox asserts that, properly construed, Section 128 of the Judicial Code as amended by the Act of January 28, 1915 (38 Stat. 803), includes this case in the class of cases wherein the decrees of the Circuit Court of Appeals are made final.

As indicated above, this case was commenced in the local insular court at San Juan and removed (R. p. 85) to the United States District Court for Porto Rico, where on June 9, 1914 (R. p. 2) the Bank filed a bill in equity to foreclose an alleged mortgage held by the Bank on property alleged to belong to Wilcox. The jurisdiction of the District Court was based solely upon the diverse citizenship of the parties, the Bank being a Porto Rican corporation and Wilcox a citizen of the United States. After various pleadings and motions, testimony was taken, and decree of foreclosure entered August 25, 1916 (R. p. 34). Thereafter a bill of review was filed and dismissed by the Court, and an appeal was perfected on February 24, 1917, by Wilcox, to the Circuit Court of Appeals, First Circuit (R. pp. 71, 72). That Court on December 3, 1917, entered its final decree as follows:

"The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill and the appellant recovers his costs" (R. p. 99).

On February 27, 1918, the Bank filed its petition for an appeal to this court alleging a final decree, matter in controversy in excess of $1,000, "and that this cause is one in which the decree of the Circuit Court of Appeals is not final, and is a proper cause to be reviewed by the Supreme Court of the United States on appeal" (R. p. 99).

It has been repeatedly held in construing the provisions of Sec. 6 of the Act of March 3, 1891, 26 Stat. 828, which has been re-enacted as Sec. 128 of the Judicial Code, that the decisions of the Circuit Courts of Appeals are final where the jurisdiction of the trial court depended wholly upon the "diverse citizenship of the parties."

Arbuckle et al. v. *Blackburn et al.*, 191 U. S. 405.

It is, however, the contention of the Bank in the case at bar that the phrase "diverse citizenship of the parties" must be restricted to that particular kind of diverse citizenship defined in Sec. 128 of the Judicial Code, that is, where the parties are "aliens and citizens of the United States, or citizens of different states;" and that it does not apply to the case at bar, because, although the jurisdiction of the trial court depended solely on the diverse citizenship of the parties, one of the parties, the Bank, was a corporation organized and existing under the laws of Porto Rico, and was neither an alien, nor a citizen of a state.

But no other District Court of the United States, except the District Court for Porto Rico, would have jurisdiction, on the sole ground of diversity of citizenship of the parties, of any cases except such as are defined in Sec. 128, and where that is the sole ground of jurisdiction, the decisions of the Circuit Courts of Appeals are final.

The District Court for Porto Rico has since its organization been governed as to its jurisdiction and the appellate supervision of its decisions by special legislation of Congress. Its jurisdiction has always been broader than that of any other District Court. By the Act of April 12, 1900 (31 Stat. 85), it had "in addition to the ordinary jurisdiction of District Courts of the United States jurisdiction of all cases cognizant in the Circuit Courts of the United States." By Sec. 3 of the Act of March 2, 1901 (31 Stat. 953) its jurisdiction was enlarged to include

> "controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

This was the status of the law at the time the suit at bar was instituted, and under which the District Court for Porto Rico had jurisdiction of the case. The jurisdiction of the Court has since again been changed by Sec. 41 of the Act of March 2, 1917 (39 Stat. 965), whereby, in addition to the ordinary jurisdiction of a District Court of the United States, it was given jurisdiction of all controversies

> "where all of the parties on either side of the controversy are citizens or subjects of a foreign state

> or states, or citizens of a state, territory or district of the United States, not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost the sum or value of $3,000; and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid."

(See recent construction of this provision in *Porto Rico Ry. Light & Power Co.* v. *Mor*, U.S. decided June 1, 1920.)

The statutes concerning the appellate review of the decisions of the District Court for Porto Rico were also of a special nature, and differed from those governing the review of decisions of any other District Court of the United States.

The Act of April 12, 1900 (31 Stat. 85) creating the Court, provided (Sec. 35):

> "That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied."

This provision was changed by the Act of March 3, 1911, establishing the Judicial Code (Sec. 244) to read as follows:

"Writs of error and appeals from the final judgments and decrees of the Supreme Court of and the United States District Court for Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value in dispute; *and in all other cases in which the sum or value of the matter in dispute,* exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, *exceeds the sum or value of five thousand dollars.* Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error or appeals are taken to the Supreme Court of the United States from the District Courts." (Italics ours.)

This section was repealed, and the appellate supervision of the Court again changed by the Act of January 28, 1915 (38 Stat. 804). This Act amended Sections 128, 238 and 246 of the Judicial Code to read as follows: (The new matter is written in italics.)

"Sec. 128. The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the *United States District Court for Hawaii and the United States District Court for Porto Rico,* in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hun-

dred and thirty-eight, unless otherwise provided by law; and except as provided in sections two hundred and thirty-nine [relating to certified questions] and two hundred and forty [relating to certiorari] the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all *cases arising under the patent laws, under the trade-mark laws,* under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

"Sec. 238. Appeals and writs of error may be taken from the District Courts, including the *United States District Court for Hawaii and the United States District Court for Porto Rico,* direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

"Sec. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within

the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a state in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all *other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree.*"

The same amendatory Act further provided in the same section making the foregoing amendments, and in a separate sentence:

"Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the Circuit Courts of Appeals."

The same question presented by the case at bar was raised in a case brought to this court by writ of error

to the Circuit Court of Appeals for the Ninth Circuit to review the affirmance by that court of a judgment of the Supreme Court of the Territory of Hawaii. It involved no Federal question and there was no diversity of citizenship of the parties, as defined by Sec. 128 of the Judicial Code, but the writ was dismissed for want of jurisdiction.

Inter-Island etc., Co. v. *Ward* 242 U. S. 1.

In the opinion of the Court, the Chief Justice said (p. 2):

> "The argument supporting jurisdiction is that as, by general provisions of the Judiciary Act of 1891 (26 Stat. 828), now embraced in Sec. 241 of the Judicial Code (36 Stat. 1157), power exists in this Court to review by error or appeal the final decisions of the Circuit Courts of Appeals in all cases where the jurisdiction of the Trial Court did not depend upon diversity of citizenship, or where the case was not otherwise by provisions of law expressly made final in the Circuit Courts of Appeals, therefore power to review exists, since this case is not in one of the excepted classes. But the contention overlooks the fact that from the beginning and continuously up to the adoption of the amendment of 1915, appeals and writs of error to the Supreme Courts of Hawaii and of Porto Rico were not left to be controlled by the law generally applicable to Courts of the United States, as expressed in the judiciary act of 1891, or as found in the provisions of the Judicial Code, readopting that act, but were governed by special provisions controlling the subject—a purpose which is exemplified by the terms of the amenda-

tory act of 1915. This is plain when it is considered that the two classes of cases enumerated in the amendment of 1915 were practically in the same terms expressed in the prior acts, which conferred reviewing jurisdiction in both classes exclusively upon this Court, and that the only substantial change made by the amendatory act was to take from this Court the jurisdiction to review in the second enumerated class and confer it upon the Circuit Court of Appeals to which Hawaii belonged. And indeed there is nothing in the context of the statute which countenances the view that the statute intended to merely take away the jurisdiction of this Court in one class of cases and at the same time to restore jurisdiction as to the same class by means of a power conferred or contemplated to exist to review on error or appeal the judgments and decrees of the Circuit Court of Appeals. Besides, as the remedy intended to be afforded by the amendment of 1915 was evidently the restricting of the jurisdiction of this Court to the end that the burden on its docket might be lightened, we cannot construe that amendment as frustrating the purpose which it was adopted to accomplish."

Counsel for the Bank endeavors to maintain the contentions made in the *Inter-Island* case, *supra*, and then endeavors to overcome the force of that decision (Brief p. 7 and p. 9). The question there, as here, turned upon Section 241, now relied upon by the Bank.

Similarly in *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53, 58, Section 241 of the Judicial Code was held not to authorize an appeal to this Court from the Ninth Circuit Court of Appeals, although the right to

appeal was conferred by a literal reading of the section. In dealing with Section 134 of the Judicial Code, this Court said (p. 60):

> "It is true that Section 134 begins [as does Sec. 128] by reference to cases other than those which may come to this Court, and might be construed to allow appeals to the Circuit Court of Appeals for the Ninth Circuit only in cases which could not be brought directly to this Court. But, bearing in mind the sources of the legislation which was enacted into the Judicial Code and the interpretation which this Court has placed upon the Circuit Court of Appeals Act of 1891, we are led to the conclusion that it was not the intention of Congress to give practically two appeals in the class of cases which we are now considering."

Two Appeals Not Favored.

Two appeals have never been favored and this Court has consistently declined to review judgments of the Circuit Courts of Appeals even where there was a choice of original review by this Court.

McFadden v. *U. S.*, 213 U. S. 288;
Robinson v. *Caldwell*, 165 U. S. 359;
Loeb v. *Columbia Township Trustees*, 179 U. S. 472;
American Sugar Refining Co. v. *New Orleans*, 181 U. S. 277;
Boise Water Co. v. *Boise City*, 233 U. S. 98;
Spencer v. *Duplan Silk Co.*, 191 U. S. 526;
Bankers Mutual Casualty Co. v. *Minn., &c., R. Co.*, 192 U. S. 271.

In *Robinson* v. *Caldwell*, 165 U. S. 359, this Court said:

> "It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals."

The Amendment of 1915 was intended to restrict this Court's jurisdiction and so lighten the burden on its docket. This Court has so held of this, as well as of other similar statutes.

> *Inter-Island Co.* v. *Ward*, 242 U. S. 1;
> *American Security Co.* v. *Dist. of Columbia*, 224 U. S. 491, 495.
> *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53.

While not exactly the same, it is interesting to note how similar in all these cases are the questions of construction. The object and intent of Congress in each case has been clear, although the language used can, by isolation and losing sight of the general scheme of the cognate legislation, be made to convey a literal meaning so far from the contextual meaning as to approach a *reductio ad absurdam*.

In the *Inter-Island* case, *supra*, immediate appellate jurisdiction over a class of cases from Hawaii was transferred from this Court to the Circuit Court of Appeals for the Ninth Circuit, and it was claimed that the effect of the statute was to award two appeals—one to the Circuit Court of Appeals and a second thereafter to this Court. In the *American Security Co.* case, *supra*, this Court's jurisdiction over cases from the

District of Columbia was limited by Congress to cases involving laws of the United States. It was claimed in effect that all cases in the District of Columbia arose under laws of the United States and that this Court had jurisdiction in cases involving acts of Congress of only local application. In the *Alaska* case it was contended that where an appeal was optional to this Court or to the Circuit Court of Appeals, it might first be taken to the Circuit Court of Appeals and then afterwards brought here. Each contention was overruled, this Court saying in the *American Security Co.* case that "it needs no authority to show that the same phrase may have different meanings in different connections," citing

> *Cochran* v. *Montgomery*, 199 U. S. 260, 272, 273;
> *Carey* v. *Houston & Texas*, 150 U. S. 170, 179;
> *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1 (Bank's brief, p. 11), involved a provision of the patent laws carried forward into the Revised Statutes of 1873. The principle of patent law involved had been adopted by Congress as early as 1839, and the construction placed upon the provision was in harmony with the thrice declared policy of Congress.

Source of Trial Court's Jurisdiction Determines Finality of Decree of the Circuit Court of Appeals.

As was said in the *McFadden case*, 213 U. S. 288, at page 294:

> "It is to be observed that the line of division between cases appealable directly to this Court and

those appealable to the Circuit Court of Appeals, made by Section 5 of the act, is based upon the nature of the case or of the questions of law raised. But the line of division between cases appealable from the Circuit Court of Appeals to this Court and those not so appealable, drawn by Section 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the Trial Court * * * whether the jurisdiction rests upon the *character of the parties* or the *nature of the case.*" (Italics ours.)

This Court has also said:

"The jurisdiction referred to, it has come to be settled, means the jurisdiction of the United States District Court as originally invoked. *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, and previous cases of this Court cited in the opinion of Mr. Chief Justice Fuller, who spoke for the Court in that case."

Southern Pacific Co. v. *Stewart*, 245 U. S. 359, 364.

The description in Section 128 of *classes* of cases reviewable in the Circuit Court of Appeals must be read in the light of the fact that appellate and not nisi prius jurisdiction is provided for.

In the segregation of classes of cases in which appeals to this Court may lie, it was plainly intended to exclude all cases where original trial jurisdiction depended exclusively upon citizenship of the parties. That is, the phrase "opposite parties," etc., as used in the section was intended to indicate the general ground of

jurisdiction—character of parties—of the cases intended to be included in the class and not to limit the class to cases of strict diverse citizenship, such as would give the U. S. District Courts in the States original jurisdiction. In other words, Section 128 does not attempt to define the grounds of jurisdiction of the Trial Court in cases which shall not be taken from the Circuit Court of Appeals to this Court, but merely uses language indicative of the class of cases in which the decisions of the Circuit Court of Appeals shall be final.

Moreover, when Section 128 was amended to include Porto Rico, the diversity of citizenship therein referred to, by virtue of the new context, was intended to refer and apply to the peculiar kind of party qualifications necessary to the statutory jurisdiction of the U. S. District Court for Porto Rico.

Before the amendment of 1915, no case not presenting a federal question could go from the United States District Court for Porto Rico to the Supreme Court, except those involving in excess of $5,000 (Judicial Code, Sec. 244). If Sections 128 and 241, Judicial Code, authorize this appeal, they in effect give, not only two appeals, but extend this Court's jurisdiction to cases of minor amounts ($1,000 and over), which could not be brought here before the 1915 Act.

Under the system of appeals provided by the various Act of Congress, Section 241, originally contemplated review by the Supreme Court of judgments and decrees of the Circuit Court of Appeals in cases arising only in courts of the United States. None of the Insular courts are strictly "Courts of the United States."

McAlister v. *United States*, 148 U. S. 174;
Coquitlan v. *United States*, 163, U. S. 346;

Clinton v. *Engelbrecht*, 13 *Wallace* 434;
Reynolds v. *United States*, 98 U. S. 154;
Insurance Co. v. 356 *Bales*, 1 Peters 511;
Benner v. *Prior*, 9 Howard 235;
Good v. *Martin*, 95 U. S. 90.
Fuller & Fuller Co. v. *Johnson*, 58 Pac. 745;

It is plain, therefore, that Section 241 did not contemplate granting a second right of appeal from decisions of the Circuit Court of Appeals in cases coming to those courts from the Insular courts. The District Court for Porto Rico is not a Court of the United States.

If the decision of the Circuit Court of Appeals is not made final by Sec. 128 of the Judicial Code, then the right of two appeals may exist in Porto Rico, which would not exist in the same or a similar class of cases in the U. S. District Courts in any one of the States, or in similar cases in Hawaii (*Inter-Island Co.* v. *Ward*, 242 U. S. 1), in the Philippines (Act of Sept. 6, 1916, Sec. 5, 39 Stat. 727), in Alaska, (*Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53) or the District of Columbia (*American Security Co.* v. *Dist. of Col.*, 224 U. S. 491).

Under Sec. 3 of the Act of March 2, 1901, which was in force when the case at bar was begun and finally determined, or under Sec. 41 of the Act of March 2, 1917, which at present determines the original jurisdiction of the District Court of the United States for Porto Rico, many classes of cases of which the District Courts of the United States could not take jurisdiction can be brought in the District Court for Porto Rico. For example: An alien can sue another alien in that court (provided one of them be not domiciled in Porto Rico); with the same proviso, a resident of Porto Rico

and a citizen thereof (they are all citizens of the United States, "citizen of Porto Rico" is used to distinguish them from a citizen of a State) can sue either an alien or a citizen of a State or a citizen of a Territory, or a citizen of the District of Columbia, and vice versa. It does not require any evidence to show that in the natural course of events, in nearly every case, one of the parties will be a citizen of Porto Rico. But none of these cases could be brought in any District Court of the United States on the ground of "diversity of citizenship."

Hooe v. *Jamieson*, 166 U. S. 395;
Cameron v. *Hodges*, 127 U. S. 325;
New Orleans v. *Winter*, 1 Wheat. 91;
Hepburn v. *Ellzey*, 2 Cranch 445;
Laird v. *Indemnity &c. Co.*, 44 Fed. Rep. 712.

The result of the adoption of the construction of Section 128 of the Judicial Code contended for by Appellant will be to give to the Supreme Court of the United States jurisdiction to review the decisions of the Circuit Court of Appeals by appeal or writ of error, as a matter of right, in every case where the diversity of citizenship of the parties is such as indicated in the preceding paragraph. In other words the great majority of the cases arising in the District Court for Porto Rico will go first to the Circuit Court of Appeals and then to the Suprime Court of the United States, and only in those cases (whose number is comparatively limited) where the diversity of citizenship of the parties is such as would give jurisdiction to a District Court of the United States under Sec. 24 of the Judicial Code, will the decision of the Circuit Court of Appeals be final. In other words all cases of which the

District Court of the United States for Porto Rico alone would have jurisdiction would, as of right, be entitled to two appellate reviews, whereas those of which all district courts would have jurisdiction would be entitled as of right to but one.

We contend that the intention of Congress was to prevent, rather than encourage, successive appeals; to limit, rather than enlarge, the appellate jurisdiction of the Supreme Court, and to make final the judgment of the Circuit Court of Appeals in all cases appealed to that Court from the U. S. District Court for Porto Rico unless otherwise expressly provided by law.

Congress has so construed the Act.

The Act of March 2, 1917, supra, commonly referred to in Porto Rico as the Jones Act—the last Organic Act of Porto Rico—confirms the construction of Section 128 contended for by Wilcox. Section 41 is the first section of this Act dealing with the United States District Court of Porto Rico; and Section 42 continues to treat of the same Court. The pertinent part is its last sentence, which reads:

> "The said district court shall be attached to and included in the first circuit of the United States, with the right of appeal and review by said Circuit Court of Appeals in all cases where the same would lie from any District Court to a Circuit Court of Appeals of the United States, and with the right of appeals and review directly by the Supreme Court of the United States in all cases where a direct appeal would lie from such district courts."

This statute was enacted in March, 1917, after Section 128 of the Judicial Code had been amended in

1915 to include the United States District Court for Porto Rico, as then existing under the Foraker Act of 1900 and its amendments. But apparently this new statute purposely ignores that fact, and would seem to have intended to clarify the amendment of 1915 to Section 128. In Section 43 it says:

> "That writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States *as now provided by law.*"

The repealing clause of the Act of March 2, 1917, is Sec. 58, which reads as follows:

> "That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs and duties on importations into Porto Rico prescribed by the Act of Congress entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes" approved April 12, 1900, are hereby continued in effect, *and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.*" (Italics ours.)

Why should Congress have recognized the existence of the provisions of the amendments of 1915 to the Judicial Code in the case of the Supreme Court of Porto Rico, and ignored them in dealing with the United States District Court for Porto Rico? Was it not that because of the peculiar nature of the jurisdiction of the latter Court, as based on diversity of citizenship, it was

not the intention of Congress to have the finality of the decisions of the Circuit Court of Appeals, dependent solely on the interpretation of the language of Section 128 as amended in 1915, and that the intention of the Act of 1917 was to give an appeal *either* to the Supreme Court of the United States, where such appeal would lie directly to that court from a District Court of the United States, or to the Circuit Court of Appeals in all other cases, *and no other appeals*. The Supreme Court would always have authority, under Sec. 240, to review any decision by certiorari.

For these reasons, it is respectfully submitted this Court has no jurisdiction of this appeal, and it should be dismissed, with costs.

Argument on the Merits.

POINT II.

The Circuit Court of Appeals did not err in holding that the assumption of the payment of the $1,700 mortgage was secured by fraud.

In this connection the first, second, third and fifth assignments will be discussed together (p. 100 transcript).

The District Court erred in excluding the memorandum agreement of January 13, 1913.

Wilcox, while testifying as to the circumstances under which he came to take the deed to the mortgaged property from Lopez Landron, attempted to introduce in evidence the written agreement signed by himself and

Lopez Landron on January 13, 1913 (the day before the execution of the deed of sale), which set forth the agreement reached by them at the conference held at Lopez Landron's office at which Monserrat, the Notary before whom the deed was executed and the president and stockholder of the Bank, was present. The Trial Court refused over proper exception to allow the document to be introduced. This action is assigned as error by Wilcox in his 7th Assignment of Error (p. 64 transcript) on appeal to the Circuit Court of Appeals.

This document was offered to prove the exact terms of the agreement reached by the parties, and further to prove that the deed executed by them on the day next succeeding the signing of this document did not set forth the true terms of the contract between the parties.

It is true that the Court, while refusing to admit the paper itself in evidence, allowed Wilcox to read it, and in this way it came into the record (R. pp. 52-53) so as to permit intelligent review of the question of its admissibility. It must be assumed, however, that it was given no probative force whatever. The document was the best evidence of the agreement, and the defendant was entitled to its admission, and we maintain that its exclusion was error, sufficient in itself to warrant a reversal of the decree of the District Court. The Circuit Court of Appeals has so held, and the Bank does not seriously attack this part of the decision.

The issues as raised by the amended answer (R. pp. 17, 20) presented to the Court for its determination the alternative of two propositions: either that the Notary in drawing the deed had by mistake failed to set forth in it the real agreement between the parties, or that there was wilful fraud on the part of Monserrat to secure for his Bank an advantage which otherwise it would not have had.

The Court permitted Wilcox to testify fully with regard to all the conversations and negotiations leading up to the execution of the deed; and this document, the tangible written evidence of the result of these conversations and negotiations, was certainly better evidence of the agreement of the parties than any recollection of witnesses as to statements made several years previously.

It may be proper at this time to point out that this case does not fall within the well-known rule that generally a party will not be relieved from his failure to read over a document before signing it, merely because he relied on the representations of the other party to the instrument. Wilcox relied upon the representation of the Notary, who had heard the agreement made, and who was supposed to have no personal interest in the transaction. He was a fellow lawyer, and claimed to be a friend of both parties. This question will be discussed at length in its proper place in this brief; at this point we wish merely to call the Court's attention to the fact that Monserrat, in drawing the deed, as a Notary under the Notorial Law, was not the representative of either party, but was supposed to be wholly disinterested and that the parties were entitled to rely upon him under his bond to set forth the exact agreement as made by them.

It is unnecessary to cite any authorities on the proposition that when either fraud or mistake is alleged, the real nature of the transaction may be proved, even by parole evidence. The writing in question was material both as to the mistake in the deed, if mistake it was, and also was relevant in showing whether fraud had been perpetrated.

The evidence is conclusive that during the twenty-four hours that elapsed between the signing of this

paper and the signing of the deed there was no further negotiation between the parties, and no change was made in their plan. Yet the deed as signed by them on the 14th of January, the very next day, makes Wilcox assume an unrecorded mortgage which he did not know existed, and which the agreement, signed by him and Landron the day before, makes very evident was never intended to be assumed by Wilcox, even if he had known of it. To have done so would have been to surrender the priority of his own recorded mortgage, and virtually to make the Bank a present of that sum, which he had already reduced to a judgment upon a mortgage foreclosure proceeding.

Wilcox agreed by this writing to assume all incumbrances:

> "now existing against the said property which are duly registered in the Registry of Property, which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of Sweet & Wilcox."

This document is further evidence of the fact that only one Bank mortgage was discussed. The 6th paragraph of this agreement permits Landron to reside in the house for thirty days, provided he pays a rental equal to the interest payable to the Bank "upon the *mortgage* held by said Bank against said property." Had more than one Bank mortgage been discussed, this clause would have read "mortgages" and not "mortgage" (see Bank's Brief, p. 23).

This clearly shows that Wilcox, who drew this paper, and Landron who signed it also, referred to, and had in mind at the time, only the one mortgage held by the Bank, and not two. The mortgage for $1700 which Wil-

cox appears to assume under the deed of January 14, 1913, was dated December 3, 1912, and at the time of the execution of the deed had not been recorded (R. pp. 83-85).

This mortgage, as testified to by the Treasurer of the Plaintiff Bank (R. p. 50, cross examination) was, to the extent of at least $1480, for unpaid interest on the first mortgage for $4600 held by the same Bank. It was subsequent to a mortgage held by Sweet & Wilcox which was then being foreclosed, and as to which a final foreclosure decree had been entered. The property was about to be advertised for sale. It was in fact executed but one day before the final decree in the foreclosure action was entered. The mortgage debtor, Landron, as shown by the testimony of the Bank treasurer, by the pleadings in the action brought by Sweet & Wilcox, and by the mortgage which he gave Sweet & Wilcox (R. pp. 21-29-61), was a man who was unable to meet his financial obligations. If the Bank did not get Wilcox to assume this $1700 mortgage under the terms of Wilcox's agreement with Landron, the Bank would have had recourse to Landron alone. By inserting it in the deed, and making Wilcox assume it, the Bank secured at least the position of holding first and second mortgages, instead of first and third, and substituted a third party in the place of a bad debtor. Wilcox, on the other hand, lost his position as the holder of a second mortgage, lost his rights under his decree of foreclosure, and assumed an incumbrance to which his own lien was superior.

The testimony of Lopez Landron on behalf of the Bank is in so many particulars proved untrue and inaccurate by the other evidence, that it is difficult to give any part of it credence (R. pp. 60-62). He states that he paid the interest on the $4600 until 1912, and yet the

Bank treasurer testifies that in December, 1912, there was at least $1480 due for interest, or over two years' interest. (One year's interest on $4600 at one per cent. per month is $552.) He also says that the mortgage for $1700 was given a long time before the deal with Mr. Wilcox, whereas it was executed on December 3, 1912, and the deal with Wilcox was made the next month. He also says that this $1700 was the second mortgage, and that later he gave the mortgage to Sweet & Wilcox, whereas the documents show this is not the fact.

Another peculiar circumstance is the fact that in the mortgage for $1700 (R. pp. 83-85) Lopez Landron wholly failed to recite the existence of any other mortgage in addition to the mortgage for $4600, although, as already stated, at the time he signed the mortgage for $1700 the decree of foreclosure of the Sweet & Wilcox mortgage was about to be entered against him. It may well have happened that Lopez Landron deceived the Bank at the time he gave them this last mortgage, and that the Bank did not learn of the Sweet & Wilcox mortgage and of its foreclosure until after it had taken this last mortgage. The Bank stood to lose its $1700 if the Sweet & Wilcox foreclosure went as far as sale, or else it would have to buy in the property to protect this amount. It could no longer collect the $1480 or whatever was the real amount of the unpaid interest on the $4600 for that was included in the $1700 mortgage.

This was the position in which the Bank found itself after the execution of the mortgage for $1700. Monserrat's interest in seeking to obtain some arrangement with Wilcox, instead of being solely that of a friend of Landron, was that of the attorney, the president and a stockholder of the Bank. And yet no mention was made to Wilcox of any such adverse interest, nor was any mention made of any mortgage other than the $4600 until the deed itself was drawn, when it was put in and

recited among the liens on the property. When Wilcox asked the Notary if the deed was drawn according to the agreement, he replied in the affirmative; and Wilcox, relying upon him as an attorney and a Notary, accepted his word and signed the deed, never regarding him as an adverse party with whom he must deal at arms' length. Of course, Monserrat denies that Wilcox did not read the deed, and further states that he, the Notary, read it over to him. The Notarial Law requires that the Notary should do this, and Monserrat obviously would not admit that he had failed to comply with the law.

With such a showing the trial court was justified in going into all the details of the transaction, but having gone into them, it should have admitted all, and not a part only; and particularly should it have admitted the written agreement which, under the circumstances, was the best evidence of the agreement reached by the parties.

Considering the Memorandum Agreement of January 13, 1913 (erroneously excluded by the Trial Court), with all the other evidence in the record, the Circuit Court of Appeals correctly held the deed of January 14, 1913, to have been fraudulently imposed upon Wilcox by the Notary in behalf of the Bank.

It must be borne in mind that the Trial Court's findings of fact left out of consideration entirely the memorandum agreement of January 13, 1913,—and also, it would seem, all the parole evidence in the case—taking the deed as "the *primary source* of evidence in the transaction." Even so, the trial judge found the case "not without difficulties upon the question of fact" (R. p. 86). On the other hand, the Circuit Court of Appeals in reaching its conclusion as to the facts, considered the contract of January 13, 1913, all the surrounding circumstances, the testimony of the witnesses, their interest and bias, and the human probabilities of the case.

Wilcox insists that the evidence clearly establishes either a mistake in the provisions of the deed, or a wilful fraud on the part of the Bank through its president, Monserrat, whereby Wilcox was made to assume a mortgage he knew nothing about. Neither Monserrat nor Landron can be considered disinterested witnesses. The only disinterested witness, Timpson (R. pp. 56-57 and 62) corroborates Wilcox that Monserrat was at Landron's office when the agreement was made. Let it be noted that neither Monserrat nor Landron would deny the presence of Monserrat at the conference between Landron and Wilcox when the agreement was made. Monserrat says he does not remember (R. p. 58), and so does Landron (R. p. 61). Timpson contradicts Monserrat's statement that the copy of the deed was delivered by him personally to Wilcox. Monserrat, when pressed on cross examination, finally admitted (R. p. 60) that Wilcox might have sent for the deed by some other person.

Beginning with the execution of the $1700 mortgage by Landron to the Bank on the eve of a foreclosure sale of the property under a mortgage held by Sweet & Wilcox, the whole transaction is inexplicable except on the theory of a deliberate fraud on the part of Monserrat for the benefit of the Bank. That a bank would take a third mortgage on this property when the interest on the first mortgage was so far in arrears, and the principal overdue, is astonishing. It certainly does not accord with the ordinary procedure of responsible banks. And to take it while the property is about to be sold under foreclosure is still more remarkable. Having taken such a mortgage, it is not strange that Monserrat should try to get the Bank out of the situation in some way, hence the scheme to get the property transferred to a third party. But the only way to get the Sweet & Wilcox mortgage out of the way, is to get these mortgage credi-

tors, or one of them, to take the property for the mortgage. If the mortgage creditors took over the property, by the doctrine of confusion of rights (Secs. 1160-1162 of Civil Code of Porto Rico), their mortgage became cancelled *ipso facto*, and the Bank would be the sole mortgage creditor, its third mortgage for $1700, moving up and becoming a second mortgage. We again call the Court's attention to the peculiar circumstance that although on December 3, 1912, when the $1700 mortgage was executed, the Sweet & Wilcox mortgage was not only of record, but was being foreclosed, no mention of any lien, other than the Bank's first mortgage, was made in the instrument signed by Landron and the Bank that day. The Bank (Brief p. 28) quote's Landron's testimony that the $1700 mortgage was given "a long time before the deed to Wilcox." The record shows that this mortgage was given less than six weeks before January 13, 1913. The record also shows that the interest included in the "$1700 mortgage" was made up in part of interest in advance, i. e., from December 3, 1912, to April 3, 1913. Furthermore, the $1700 was based in part, if not wholly, on an illegal consideration. There is no evidence of the exact amount owing by Landron to the Bank for interest on the first mortgage on December 2, 1912. Landron says he doesn't remember, but testifies it was paid up to 1912, while the Bank's treasurer is unable to testify exactly, but puts it at about $1480. This was the greater part of the consideration for the $1700 mortgage. Both mortgages carried the highest rate of interest permitted under the laws of Porto Rico, viz., twelve per cent. per annum. The $1700 mortgage was, therefore, only an attempt to extort usury, in other words, an attempt to get interest on interest. This question will, however, be treated fully in another point of this brief; it is mentioned here solely as a step in the chain of events. Under all of these circumstances it is

not strange that Monserrat, in approaching Wilcox, did so, not as representative of the Bank, but as fellow lawyer and old friend of Landron, who did not want to see his friend humiliated by having his home sold over his head. No one can doubt after reading the evidence, that the interview took place at Landron's office, and that Monserrat was there, and that an agreement was reached. What was then agreed upon might have been left to the recollection of the witnesses, but for the document signed by Landron and Wilcox on January 13, 1913, which Landron recognized and later (R. p. 61) admitted he signed. But in connection with Landron's testimony, it is to be observed that he continually attempts to get into the record the statement that the order of the mortgage liens was, first, the mortgage for $4600; second, the one to the Bank for $1700, and last the Sweet & Wilcox mortgage; whereas, the last was the second, and the $1700 mortgage was the third. It is also significant that Landron does not categorically deny that Monserrat and Wilcox were in his office. Like Monserrat he hides behind the old phrase that "he doesn't remember."

In this connection Monserrat's testimony (R. pp. 58-60) should be most carefully scrutinized. He is the president and a stockholder of the plaintiff Bank, and would, to such an extent as he was a stockholder, personally profit or lose in its transactions. In this action he is charged in his professional character as an attorney and a Notary with either mistake or an actual act of fraud. He is, necessarily, heavily interested in the outcome of the trial. He testifies in rebuttal on behalf of the plaintiff, after Wilcox had testified fully as to the part taken by Monserrat in the whole transaction. The most significant part of this entire testimony is that he does not make even an attempt to contradict's Wilcox's testimony as to the part Wilcox charged him with taking

in bringing about the arrangements between Wilcox and Landron which culminated in the deed of January 14, 1913. Wilcox's testimony in this regard is therefore uncontradicted, and it must be accepted as a fact that Monserrat was the person who initiated the negotiations, and exactly in the way that Wilcox says. Having secured Wilcox's consent to a conference to discuss terms of settlement, it is only natural that he should have been present when the parties came together to discuss the terms.

As to the conference in Landron's office, Monserrat says: "I don't remember to have been present at a meeting at Mr. Landron's office" (R. p. 58). Later he says: "I was not present when the agreement between Mr. Wilcox and Mr. Landron was made; this is the first time I ever saw that document" (R. p. 58). It is not clear whether he means that he was not present when any agreement between Wilcox and Landron was made, or that he was not present when Wilcox and Landron signed the written agreement on January 13, 1913. If he means the first, he is contradicted both by Wilcox and by Timpson, and he contradicts himself as well. Monserrat states (beginning line 10, testimony of Monserrat, R. p. 58): "In accordance with instructions which he (Wilcox) gave me I took down my notes. Then I asked the other party (Landron) if he agreed with that contract and he answered affirmatively. • • • Of course, this took place on a certain day to be carried out or executed on the next day upon his return from the country." And again (line 17, R. p. 60): "I received instructions on one day as to how to draw the deed and perhaps on the next day the paper was ready. • • • Then of course the parties got together, at least twice, before the Notary."

Monserrat himself, by these statements, admits that the parties to the deed had a meeting before him, prior

to the day on which the deed was executed. Wilcox and Timpson say such a meeting took place. Landron "doesn't remember." Wilcox and Timpson say the meeting was at Landron's office, and that Monserrat was there. Monserrat admits a previous meeting of the parties in his presence, but does not say where. The terms of the agreement were reduced to writing, and this written document was signed by the parties only the day before the deed was executed.

If Monserrat meant to testify that he was not present when this written memorandum of agreement was signed, he agrees with all the witnesses, for the evidence is that Wilcox drew it up and signed it, after the conference between the parties, and sent it to Landron for his approval and signature.

The day after the paper setting forth the terms of the agreement in unequivocal language was signed, Wilcox went to the office of Monserrat to sign the deed. Signing on the part of the grantor, under the Spanish practice, is the equivalent of the delivery elsewhere in the United States. He was in a hurry, he testifies. As provided by the Notarial Law of 1906, Sec. 17, the original document which Wilcox signed in Monserrat's office, was written in long hand, for this section of the law forbids the use of a typewriter in drawing the originals, the first page containing twenty lines and the remaining three sides of the sheet, twenty-four lines each (Section 12 of Notarial Law of 1906). This document as printed in the record covers five full pages (pp. 29-34). It was no short document, or one whose contents could be as readily grasped as a printed or typewritten paper. In addition to all this, it was written in the Spanish language, which was not Wilcox's native tongue. To have translated such a document, would have been a long and tedious job. It is often

difficult at once to grasp the meaning of a legal document written in one's own language, and the task is greater when the document is couched in a foreign tongue. The terms had not only been discussed and agreed upon in the presence of the Notary, but had been reduced to writing only the day before. It was not extraordinary, under all these circumstances that Wilcox should rely upon the statement of the Notary (whom he believed to be not only impartial but also a man of standing in the community), that the document was drawn in accordance with the agreement of the parties. The fact that the document was drawn in Spanish, appears from the certificate of the Court Interpreter, Mr. Fano, at the end of the document (R. p. 34). Wilcox had no cause at the time to suspect Monserrat of any interest in the transaction other than his statement that as an old friend of Landron, he wanted to bring about a settlement between them that would avoid a forced sale of the property. There is no evidence that at this time Wilcox knew that Monserrat had any relation whatever with the Bank which held the first mortgage. He knew him as a fellow lawyer and a Notary. He relied upon him to set forth in the deed the agreement which he had brought about, and which he had heard discussed and entered into by the parties. Wilcox knew nothing about the $1700 mortgage. It had not been presented for record. As a matter of fact, it was not presented for record until January 28, 1913 (R. p. 85), just the day before the deed to Wilcox was presented for record (p. 34) and fourteen days after the deed to Wilcox had been executed. This was apparently just at the time Wilcox was seeking to get a copy from Monserrat and stamps from Landron for recording the deed. This is another most peculiar circumstance and coincidence. The Bank

held this mortgage from December 3, 1912, until January 28, 1913, before presenting it for record, when the Civil Code of Porto Rico (sec 1776) provides that in order that a mortgage shall be validly constituted, it must be presented to the Registry of Property.

And is it reasonable to suppose that Wilcox, who the day before had signed an agreement specifically promising to assume only those obligations of record which bore a date prior to the Sweet & Wilcox mortgage, should on the next day, without any further negotiations, or any new consideration, agree to assume an obligation which was not at the time a lien on the property? Sweet & Wilcox had a decree in their favor for $1465.35 and $300 in addition (Final Decree, R. p. 23) or $1765.35, which Wilcox under his agreement with Landron was to satisfy by taking a deed to the property and assuming the obligations of record prior to the Sweet & Wilcox mortgage. The deed makes him agree to cancel the Sweet & Wilcox mortgage and to assume in addition to the prior lien, a personal obligation of Landron's for almost the identical amount that Landron owed Sweet & Wilcox. And we insist that this was, at the time of signing the deed, only a personal obligation, because until it was recorded, or presented for record, it did not become a lien upon the real property. With one hand, Wilcox gives Landron $1763 and with the other, he assumes Landron's obligation to the Bank for a like amount.

And who are benefited by this arrangement? Technically Landron, in the first place, because all his obligations to the Bank are assumed by Wilcox. But to all practical purposes, Landron is not much concerned, as is evident throughout his testimony, because he had nothing left with which to meet these obligations. He had only the house and lot, and these he was giving up.

In his testimony, he said, "at the time I had no interest in the house, I considered it a loss" (R. p. 61). But the one benefited to the greatest extent was the Bank, the plaintiff in this case, for it secured a new debtor, an endorser, so to speak, of Landron's indebtedness to the Bank, and not only secured this new debtor's personal responsibility for all of Landron's indebtedness, but converted the personal obligation of Landron, that is to say the unrecorded mortgage for $1700 into a lien upon the property conveyed to Wilcox.

Turning for a moment to the deed itself, and bearing always in mind that this was a long instrument, written in long hand, in the Spanish language, and with all amounts written out and not stated in numerals, this deed (R. p. 29) recites two mortgage liens on the property, one for $4600, the other for $1700. As we have seen, there were two mortgage liens at that time, the first for $4600 and the second (Sweet & Wilcox) amounting under the decree to $1765.35. Is there not a suspicious similarity between the amount of $1700 recited in the deed as the amount of the so-called second mortgage, and the amount of $1765, which was the amount due on the real second mortgage? Monserrat knew that the property was subject to the Sweet & Wilcox mortgage at the time, for he recites it in the deed in clause fourth (R. p. 31). Why does he omit it, in stating the liens then existing, and refer to it in an entirely different clause? And we must remember in this connection, that no one has given a plain straightforward explanation of how the amount of the last mortgage from Landron to the Bank came to be $1700. Part was interest, we are told, and part cash, but the exact amount of the one or of the other cannot be stated, either by Landron, the debtor, or by the treasurer of the Bank. Is not this, in itself a most sus-

picious circumstance? Does not this dovetail into a wilful, carefully prepared plan to saddle this mortgage of $1700 on Wilcox, if he can be induced to take over the property? Does this not explain why no mention is made to Wilcox throughout the negotiations of the existence of this mortgage, and why it was not presented for record before Wilcox's signature to the deed was secured? The deed is drawn in such a manner that any one casually examining it, would find that it recited two mortgage liens, one for $4600 and another for $1700. The property was then subjected to two mortgage liens, one for $4600 the other for $1765. But the exact amount of the second mortgage recited is not so material to the purchaser, because under his agreement, it is to be cancelled anyway. Monserrat knows that the purchaser knows of but two liens and but two are recited. The amount of one which is substituted for the real second lien is almost identical in amount. The whole transaction is one which should make a strong appeal to a court of equity as one entitling Wilcox to full and complete relief.

If Wilcox, in this action cannot obtain the affirmative relief of having the deed to him declared null and void because of fraud on the part of the Bank or of mistake on the part of the Notary, at least, he is entitled to set these matters up as a defense to the Bank's action, and to prevent in this action the perpetration of a fraud.

And, if, as we insist, this was a deliberate fraud practiced upon Wilcox by Monserrat as an official of the Bank, for the benefit of the Bank, can it be said that the Bank comes into equity with clean hands, or that it is entitled to any consideration at the hands of a court of equity?

In view of the cases elsewhere cited, it is unnecessary to burden the Court with a citation of authorities to

sustain the proposition that in cases of mistake or fraud, courts of equity will relieve the prejudiced parties.

The Bill of Review, and the opinion of the Court on the motion to dismiss this Bill of Review (R. pp. 36-45 and 46-49) show that Wilcox promptly brought an action in the United States District Court for Porto Rico against the grantors in the deed of January 14, 1913, to declare the same null and void, and that a final decree was entered in that action in favor of Wilcox on January 4, 1917 (pp. 87-88), within a few months after the entry of the decree of foreclosure appealed from herein, and before a sale of the mortgaged property was had under this decree. So that while Wilcox, in this action was defending against the foreclosure on the grounds of mistake or fraud, he was at the same time litigating with the grantors the validity of the same deed on the same grounds.

Wilcox was entitled to be put back in the position occupied by him at the time the deed was executed to him, and neither ordered to pay what he did not undertake, if it were a simple mistake of the Notary, nor any part of the amount if the whole transaction was, as we insist, a deliberate fraud. Nor should he be exposed to a deficiency judgment for any amount not covered by the sale of the property.

In view of all the evidence and all the surrounding circumstances, which in cases of this nature often speak louder than the words of the witnesses, the trial court erred in finding that neither mistake nor fraud entered into the transaction, and the Circuit Court of Appeals did not err in so finding.

It will of course be urged that Wilcox was negligent in failing to read the deed, and that he should not be relieved from the consequences of his own negligence.

But this question has often been before the courts, as the following cases will show, and relief has been afforded in equity under similar circumstances. Particularly is this so when trust and confidence are reposed in the person making the representations as to the contents of the instrument, as in this case, where the party representing the instrument to be in accordance with the previous agreement between the parties was not the other party to the deed, but was the Notarial official to whom had been entrusted the task of reducing the agreement to a recordable form.

If a known trust and confidence is reposed in the person making representations as to the contents of a written instrument, and there is a relationship justifying such trust and confidence, then the person to whom they are made may rely upon them. *Robinson* v. *Glass*, 94 Ind. 211, 37 L. R. A. 600.

In *McGinn* v. *Tobey*, 62 Mich. 252, where a person signed without reading what purported to be a duplicate lease but which proved to be a deed of his real estate, at the instance of a lawyer who had transacted his business and drawn the lease for him and who professed to be his friend, the Court says that under the circumstances he had a right to put a little faith in the integrity of one honored and trusted in the community where he lived, and was not so negligent in signing the duplicate without reading it as to lose his rights in the property against one holding on the faith of the record title.

In *Elliot* v. *Sackett, et al.*, 108 U. S. 132, this Court reversed a decree of the Circuit Court and set aside a deed which was at variance with a written agreement, and applied the principle laid down in *Snell* v. *Insurance Co.*, 98 U. S. 85. In the opinion in *Elliott* v. *Sackett*, the Supreme Court said:

> "Elliott (the appellant) says that when Sackett gave him the deed in Hill's office, he was unwell; that he did not read that part of the deed which states that he is to assume and pay the incumbrance, but only read the prior part which states that the conveyance is made subject to the incumbrance,"

and that

> "Under all the circumstances proved this case (and every case of the kind must depend very largely over its special circumstances), Elliott had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches, in not observing the provisions of the deed, as should preclude him from relief."

And further, that

> "The fact that Elliott made two payments of the interest on the incumbrance is not inconsistent with his not having assumed the payment of the incumbrance. As owner of the property subject to the incumbrance, and desirous of retaining it so long as there was any value in the equity of redemption, he would naturally pay the interest to save a foreclosure."

Wilcox paid interest only once: the bill was so large that it surprised and mystified him. He then sent to the recorder's office where the copy had been sent, got it, and for the first time discovered the $1700 mortgage to the Bank. After this he refused to make other payments of interest (R. p. 53). Wilcox had not seen the copy before it went to the recorder's office, because Mr. Timpson, at his request, went to the Notary's office,

and got it and took it direct to the recorder's office (p. 62, testimony of Timpson, p. 60, testimony of Monserrat).

One party may trust the other to reduce the agreement to writing.

Botsford v. *McLean*, 45 Barb. 478.

It is not necessarily negligent to rely upon the representation of a person who has taken the draft of a contract away to copy, that the papers he returns are correct copies of the draft.

Strong v. *Linington*, 8 Ill. App. 463.

One who has entrusted the other party to the contract with the duty of reducing it to writing may rely on his representation that he has done so accurately. One who has perpetrated a fraud should not be permitted to say to the defrauded party that he ought not to have believed or trusted him.

Albany City Sav. Ins. v. *Burdick*, 87 N. Y. 40. See also cases cited in note 6 L. R. A. (N. S.) 462.

Griffin v. *Roanoke Ry., &c., Co.*, 140 N. C. 514, 6 L. R. A. (N. S.) 463.

Bixler v. *Wright*, 100 Atl. 467, L. R. A. 1917 F. and note.

One may defend against the enforcement of a mortgage the signature to which was obtained by fraudulently representing that it embodied the contract previously entered into orally, and although there was negligence in failing to read the instrument. In *Colorado Invt. Co.* v. *Beuchat*, 48 Colo. 494, 111 Pac. 61. The Court stated:

"While, in ordinary business transactions, men are expected to exercise reasonable business prudence, and not rely upon others with whom they deal to protect and care for their interest, that requirement is not carried so far as to ignore or protect positive, intentional fraud successfully practised by one upon the other. As between the original parties, one who has intentionally deceived the other, to his prejudice, is not to be heard to say in defense of the charge of fraud that the party defrauded ought not to have trusted him. A person cannot procure a contract in his favor by misrepresentations regarding its terms and conditions to the one signing it, which induces the latter not to read it, and then bar a defense to it on the ground that, had the defrauded party not been so negligent, the party committing the fraud could not have succeeded in deceiving him, when the negligence of the party deceived is caused by misrepresentations and false statements of the other. In brief, the negligence of a party to a contract, induced by the fraud of the other, cannot be taken advantage of by the latter."

In *Herried* v. *Chicago, M. & St. P. R. Co.,* 159 N. W. 1064, it was held that failure to read a deed of right of way did not preclude grantor from avoiding a release-of-damage clause contained therein, where, previous to the signing of such instrument, there had been a specific oral agreement that conveyance of the right of way should in no way preclude grantor from recovering any damages that he might suffer by injury to or destruction of the spring, and, in reliance upon such statements, and believing them to be true, his signature was procured.

And again in *Tanton* v. *Martin,* 80 Kan. 22, 101 Pac. 461, one was held not precluded from contesting the

validity of a lease by the fact that he failed to read it before attaching his signature, where it contained terms other than those orally agreed to, and he signed under the belief, induced by the false representations of the other party, that it embodied the terms previously agreed to. The Court said:

> "It is contended that if parties who sign an instrument can read, they will not be heard to say that they did not read or know the contents of the writing, unless they were dissuaded from reading it by some fraudulent act, artifice, or trick. Was there no fraud, artifice, or trick in the act of plaintiff's agent in telling the defendants that the long, complicated writing of about seven printed pages contained only the provisions requiring them to pay two-fifths of the grain and $60 in cash, when he had placed in the body of the lease a provision requiring them to pay $200 that had not been mentioned in the oral negotiations? Was there no fraud, artifice, or trick in lulling inquiry as to the contents of such a writing by falsely and fraudulently representing that it contained only certain specific things, where there had been inserted another stipulation greatly enhancing defendant's liability? There is a well recognized exception to the rule that a party is bound to know the contents of a paper which he signs; and that is where one party procures another to sign a writing by fraudulently representing that it contains the stipulations agreed upon when in fact it does not, and where the party signing relies upon the faith of these representations, and is thereby induced to omit the reading of the writing which he signs. It is well settled that a written contract which one party induces another to execute by false representations as to its con-

tents is not enforceable, and the party so defrauded is not precluded from contesting the validity of the contract by the fact that he failed to read it before attaching his signature."

See also:

Hale v. *Hale*, 59 S. E. 1056, 14 L. R. A. (N. S.) 221.

Stone v. *Moody, et al.*, 84 Pac. 617, 5 L. R. A. (N. S.) 799.

American Fine Arts Co. v. *Reeves, P. Co.*, 127 Fed. 808, 810.

In *Shields* v. *Mongollon Exp. Co.*, 137 Fed. 539, it was held that:

"Where, in executing a deed in pursuance of a settlement, the grantor relied on the representations of his attorney, who informed him that the deed was 'all right and according to a memorandum' where the grantor had furnished, he was not guilty of such negligence, in failing to read the deed, as precluded a subsequent reformation thereof, so as to exclude an interest in a certain mining claim included by mutual mistake."

It has also been held that:

"Where a party carelessly or negligently signed a written contract which, by mistake of the scrivener, failed to conform to the oral agreement made by the parties, he may have the written contract reformed in equity if the evidence clearly shows what the oral agreement was."

Story v. *Cammell*, 68 Neb. 709, 94 N. W. 982.

It will be insisted, of course, that the plaintiff's evidence is to the effect that Wilcox did not sign the deed without reading it, but that, on the contrary, he not only read it himself, but that the Notary, Monserrat, read it aloud. There is only the testimony of Wilcox on the one hand, and the testimony of Monserrat on the other. But according to Monserrat, not only Wilcox, but Landron and the two witnesses were present when all this reading was being done. Where is there any testimony from Landron on this point? He is produced as a witness in rebuttal by the plaintiff, but he is not questioned as to what took place in Monserrat's office when the deed was signed. Nor are either of the witnesses to the deed produced, although Monserrat says they were present. In this connection, the charge made in the cross-bill and in the amended answer, that these witnesses were really employees of Monserrat, and therefore disqualified to act as witnesses to the deed, may be the explanation of their absence from the trial. But whether that was the reason for not producing them, no reason was given for their non-appearance. Monserrat, the Notary had to insist that he had complied with the provisions of the Notarial law. Section 17 of the law of 1906 provides:

> "Public instruments shall be drawn up in the Spanish language but may be in English whenever the persons taking part thereto know such language. They must be written in a legible manner and without abbreviations or blank spaces, but shall not be typewritten. Figures shall not be used in the statement of dates and amounts, and the notary shall certify that he has read the instrument to the parties and witnesses to its execution, or that he had allowed them to read it, at their option, before signing, and had apprised each of his right to read it for himself."

He could not admit that he had allowed Wilcox to sign the instrument without reading it, or having read it to him, because such an admission would mean that Monserrat had failed to comply with the law.

Answering Point II Bank's Brief.

The Bank fails to point out the "documentary evidence of the most important character disproving the charges of fraud and demonstrating the defendant's lack of credibility," which it says (Brief, p. 16) the Court failed to consider. The pleadings referred to on pages 19 and 20 are not inconsistent with Wilcox's testimony. It is plain that the agreement with Landron, excluded by the Trial Court, had as its primary object the working out of Landron's financial difficulties by postponing a forced judicial sale of the mortgaged property. The exact steps to be taken of course depended upon events to follow the agreement of January 13, 1913.

The Bank also complains of the reversal of the Trial Court's finding of facts (Bank's Brief, pp. 14-16). It is to be noted that the Trial Court's conclusion was the result of *indecision* on the evidence considered, excluding the most persuasive and convincing of it, namely, the agreement of January 13, 1913. The Court of Appeals took into consideration this agreement, which of course throws an entirely different light on all of the other evidence considered by the Trial Court. Taking this agreement into consideration, the evidence sustains Wilcox's contentions beyond any reasonable doubt.

The Bank again (Brief, p. 18) says the evidence was squarely conflicting. The evidence for Wilcox was positive and direct, whereas the Bank's witnesses "could not remember."

The Bank's Brief, page 22, in discussing the interest, gives $368 as the amount of two unpaid quarters on the $4600 mortgage. This is incorrect, as the interest on $4600 for two quarters at 12 per cent. is only $276. In the same connection the Bank, at the bottom of page 22, says: "The receipt he took was for 'the sum of $252 as interest on the sum of $6300 for four months'" (R. p. 50)...In fact the receipt was for $252, but does not disclose the period or the amount upon which it was paid.

The argument on the facts in the Bank's Brief, although perhaps not intentionally so, is grossly unfair at certain points not elsewhere pointed out. For instance at the bottom of page 23 and top of page 24 it is said that the description of the incumbrances in the excluded agreement as those "which bear a date prior to that of the mortgage" to Sweet and Wilcox, is due to the fact that Landron understood that these mortgages were recorded (R. p. 61). This could not be true, because the $1700 mortgage was not executed until December 3, 1912, long after the date of the Sweet and Wilcox mortgage.

In the same paragraph Wilcox's testimony is attacked because it is said he testified that the agreement refers to the first mortgage and states the amount (R. p. 55). The record shows that Wilcox did not recall whether the agreement stated the amount or not. His recollection was not clear on the subject and he had to refresh it by examining the agreement, as his testimony shows.

Again on page 24, the Bank states that Landron testified that he understood Spanish better than English. The record (p. 56) shows that he testified that he understood Spanish better than he spoke it (Spanish).

POINT III.

The Circuit Court of Appeals did not err in adjudging that the deed is null and void under provisions of 1998, R. S. of Porto Rico.

This proposition covers the Sixth, Ninth and Twelfth assignments, which refer to the $4600 mortgage, and the Seventh which refers to the $1700 mortgage. If the deed be null and void under the provisions of Section 1998, it would equally affect the $1700 mortgage.

It was alleged in the verified amended answer herein that the Notary who drew the deed of January 14, 1913, and before whom the same was executed, was at the time, the president, the legal representative and a large stockholder of the plaintiff Bank, and that therefore the deed was null and void under the provisions of Section 1998 of the Compiled Statutes of Porto Rico (Sec. 20 of the Act to Regulate the Notarial Profession in Porto Rico, approved March 8, 1906).

It was also alleged in the same amended answer that the witnesses to the execution of this instrument were in the employ of the Notary, and that therefore, under the same section of the laws of Porto Rico, the deed was null and void.

Both of these allegations are in paragraph IX of the amended answer (R .p. 19).

(a) The deed was null and void because the Notary, Monserrat, was at the time a stockholder of and the president of the mortgagee.

The alleged relationship between the Notary, Monserrat, and the Bank which held the two mortgages on the property was admitted on the trial (see stipulation, R. p. 50).

Section 20 of the Notarial Law relied upon, which is Section 1996, Compiled Statutes of Porto Rico, reads:

> "The following public instruments shall be null and void:
>
> 1st.—Those in which the notary authorizing the same has intervened as a party thereto, or which contain any provision in his favor.
>
> 2nd.—Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument, are witnesses thereto."

The office of Notary in Porto Rico, and his position in the community is a very different thing from that of a Notary Public as generally known throughout continental United States. The Notarial Laws and Regulations promulgated by Spain for Cuba and Porto Rico as set forth in Part 3 of House of Representatives, Document No. 1484, 60th Congress, 2nd Session, pages 2947-2969, show in detail the importance and responsibility of their office and duties. The above Section 20 of the Notarial Law of 1906 is a re-enactment of Art. 27 of the Spanish Notarial Law. The decisions of the Spanish Courts contain no decision, so far as we have been able to discover, construing this section with regard to documents executed before a Notary interested as stockholder or officer in an institution affected by, or interested in, the transaction. And no such decision can exist for the reason that under the old law the Notary was expressly prohibited from taking part in the administration of any such institutions within their district. Section 26 of the Organic Notarial Regulations for Cuba and Porto Rico provided:

"Art. 27.—Notaries cannot be surety for the contracts they certify to, nor take part in the notarial district:

1.—In transactions of speculation, exchange, or profit which are not the income of their own property.

2.—In the administration of any bank of discount or brokerage establishment of a commercial or industrial company or of enterprises for leasing public revenues.

3.—In contracts or business in which they take part by virtue of their office."

The object and purpose of the Spanish Notarial Law was to compel the Notary to occupy such a position in the community that he would not be open to any suspicion of interest in the transactions which might require his services in his district.

The entire system for the execution of notarial documents is different in Porto Rico from that existing elsewhere in the United States, with the exception of Louisiana.

A number of sections of the Notarial Law are here referred to, to show the extent of the precautions taken to guard against fraud, wise precautions in view of the great probity accorded notarial instruments in Porto Rico.

(1) Section 1990, Compiled Statutes of Porto Rico:

"Original instruments shall be written on full sheets and the part left for the binding shall be a blank margin of twenty millimeters and besides a margin of sixty millimeters on the left side of each page of the instrument, where the notary shall affix his special mark, and a margin of three milli-

meters on the right side of each page: Provided, that notaries shall commence original instruments on new sheets only, and the front side of the first page shall contain twenty lines and the remaining sides twenty-four."

(2) Section 1991:

"No public instrument, save those especially provided by law, shall be authenticated by a notary unless executed in the presence of two witnesses: Provided, That those who do not know how to sign, relatives, clerks or servants of the certifying notary, and relatives or parties in interest, within the fourth degree of consanguinity or second degree of affinity, shall not be admitted as witnesses to public instruments."

(3) Section 1994, provides that the notary shall certify as to his acquaintance with the parties to the instrument, but if not known to him, their identity may be certified to by two witnesses whom he knows.

(4) Section 1995:

"Public instruments shall be drawn up in the Spanish language, but may be in English wherever the persons taking part therein know such language. They must be written in a legible manner and without abbreviations or blank spaces, but shall not be typewritten."

(5) Section 2009, the protocols are bound periodically.

(6) Section 2013, protocols are the property of the People of Porto Rico and never leave the notary's possession, except in case of his death, resignation or dis

qualification when they are taken to the Keeper of Archives of the District.

(7) Section 1999:

"Provisions in favor of relatives within the fourth degree of consanguinity or second of affinity, of the person certifying as a notary, shall be of no effect and are null and void."

Provision is made for issuing copies of notarial instruments in C. S. of P. R. 2001, 2002 and 2003. Certified copies of the originals are issued for recording in the proper office of the Recorder of Property, the originals never leaving the Notarial archives.

From C. S. 1990 quoted above, it is seen that the original is made on loose sheets, facilitating unauthorized changes in the instrument by rewriting and substituting a page, as the signatures appear only on the last page of the instrument. And in this suit, we have before us and are forced to rely upon, not the original documents, but *the certified copies* of the originals issued by the Notary, Damian Monserrat, the president and a stockholder of the plaintiff Bank, who is beneficially and otherwise heavily interested in the result, a situation never contemplated by the law in Porto Rico, and against which it attempts to guard.

The Bank argues (Brief p. 37) that the deed did not contain any provision in favor of either Monserrat or the Bank, but at page 57 it cites the Trial Court's opinion referring to the Bank as the principal party in interest. If the Bank was not a party in interest and if the deed contained no provision in favor of it or of Monserrat, its president, then the District Court erred in dismissing the Bill of Review. In any event, the Bank's right against Wilcox depended entirely upon Wilcox's agreement with Landron. It makes little dif-

ference by what terms this interest is defined or described. Equity looks through form at the substance of things.

Before considering the decisions of American courts on the question, we insist that under the very language of the section quoted, in view of all of the circumstances of this case, and particularly in the light thrown on the spirit of the Notarial Law by Art. 27 of the old law above quoted, the Notary, Monserrat, was disqualified from acting as a Notary in the execution of the deed from Landron to Wilcox.

Taking first the literal words of the statute, does not this deed while not specifically naming him as a beneficiary, nevertheless contain a provision in favor of the Notary? He is the president and a stockholder of the Bank which holds two mortgages on the premises transferred; he has been present at a conversation between the parties at which Wilcox agrees to assume the encumbrances on the property of record prior to a certain date; the second mortgage held by the Bank is not of record and was executed after the date fixed in this agreement; the property is about to be sold at foreclosure under a mortgage superior to the second mortgage held by the Bank; the Bank will be compelled, if the foreclosure sale is held, to buy in the property to protect its last mortgage, or, if Wilcox only assumes the first mortgage, the Bank will be left to look to Landron for $1700. Landron's inability to pay any such sum had just been demonstrated, first by his failure to pay to the Bank the interest due on the first mortgage, and second, by his failure to meet the notes secured by his mortgage to Sweet & Wilcox, resulting in the foreclosure of their mortgage on his dwelling. Under all these circumstances, can it be said that a deed whereby a new debtor assumed all the responsibilities of a

bad debtor contained no provisions in favor of one who was both an officer and a stockholder of the creditor Bank? Actually the stockholders are the ones who benefit by the profits, and suffer through the losses of a corporation, for while, in name, the corporation is the gainer or the loser, the stockholders are those who reap the benefit or feel the loss. Under the old Notarial Law, as we have seen, he would not have been open to this temptation, for he could not, without a violation of the law, have been placed in such a predicament. In view of all the circumstances, it cannot be said that the corporation of which he was both stockholder and president derived no benefit from the deed.

We insist that the benefit accruing to the Bank and to the Notary has been made most manifest.

It is settled by a long line of decisions, with but few exceptions, that an acknowledgement to an instrument, taken by an officer who has a direct beneficial interest in the instrument is void; and a stockholder of a corporation is generally held, in accordance with this rule, to be disqualified to take an acknowledgement to which the corporation is a party.

Ogden Bldg. etc. Ass. v. *Mensch,* 196 Ill. 554, 63 N. W. 1049;
Wilson v. *Griess,* 64 Neb. 792, 90 N. W. 866;
First Nat. Bk. v. *Citizens St. Bk.,* 11 Wyo. 32, 70 Pac. 726;
Miles v. *Kelley* (Texas), 40 S. W. 599;
Jenkins v. *Jonas Schwab Co.,* 138 Ala. 664, 35 So. 649;
Hayes v. *Southern H. B. & L. Ass.,* 124 Ala. 663, 26 So. 527;
Winsted Sav. Bk. v. *Spencer,* 26 Conn. 195;
Betts-Evans Trading Co. v. *Bass,* 2 Ga. App. 718, 59 S. E. 8;

Southern Iron & Equipment Co. v. *Voyles,* 138 Ga. 258, 75 S. E. 248;
Opinion of the Justices, 75 N. H. 313.

The rule is universal that an officer cannot take an acknowledgement of his own deed. And because of the probative force accorded to the certificate, as well as the usually important consequences of the instrument itself, public policy forbids that the act of taking and certifying the acknowledgement should be exercised by a person financially or beneficially interested in the transaction. 1 Cyc. 553. While there may be some diversity of opinion in the application of the rule in determining whether the officer is disqualified by interest in the particular case, the wisdom of the rule has never been doubted. The rule that interest will disqualify does not depend upon any statutory prohibition. It arises out of the fact that it is against public policy to permit a grantee or mortgagee, or any other person beneficially interested in the transaction, to take an acknowledgement to an instrument in which he is named as a party, or has a beneficial interest. The law contemplates that the Notary must not be in such pecuniary relationship to the transaction that there shall exist any temptation for him to be otherwise than impartial between the parties to the conveyance.

It is maintained in a large majority of the decided cases on this point that a stockholder of a corporation beneficially interested in an instrument is disqualified from taking an acknowledgment thereto. 1 Devlin, Real Estate, Sec. 477b. See note to the case of *Ardmore Nat. Bk.* v. *Briggs Machinery & Supply Co.,* 16 Ann. Cas. 133, where a large number of cases are collected and examined; *Betts-Evans Trading Co.* v. *Bass,* 2 Ga. App. 718, 59 S. E. 8. While it is conceded, under the doctrine of corporate entity, that a stockholder has no independent

ownership in the corporate property, nevertheless, if the corporate property is enhanced in value, he gets the benefit of the enhancement in the increased value of his shares; and while the benefit may be small, the amount of beneficial interest cannot be made the criterion of disqualification on the ground of interest. His shares of stock entitle him to such aliquot parts of the corporate property as his number of shares bears to the entire capital of the corporation. His holding of stock may be so large that almost any transaction of the corporation may affect the value of his shares. Indeed, a corporation may have only one stockholder (*Exchange Bank* v. *Macon Constr. Co.*, 97 Ga. 1, 33 L. R. A. 800, 25 S. E. 326), and in such a case there would be no difference, even in degree, between the pecuniary interest of the stockholder and the corporation.

Southern Iron & E. Co. v. *Voyles*, 138 Ga. 258, 75 S. E. 248.

This is the way in which the courts regard the mere taking of the acknowledgment to an instrument not necessarily prepared by the Notary. How much more should the same rule apply to the Notaries of Porto Rico, who are charged with the duty of drafting the entire document, before whom it is executed, and who, after its execution, retain the original in their custody, delivering only to the interested party copies of the original certified to by the Notary.

Applying the proposition as laid down in the above citation to the case at bar, we have the president and a stockholder of a bank acting as the Notary who drew, and before whom was executed, an instrument in which the Bank was most certainly "beneficially interested." And the doctrine laid down in this citation is merely a statement, in different language, of the Porto Rican

statute, that a Notary shall not authorize any document containing a provision " in his favor," and that any such document which he may authorize shall be null and void.

There is no evidence in the record that at the time of the execution of the deed by Wilcox, he had any knowledge of the relation existing between Monserrat and the Bank.

(b) **The deed was null and void because the witnesses were clerks and servants of the Notary. This meets the 10th assignment of error.**

This ground of nullity is statutory, being the second provision contained in Sec. 20 of the Notarial Law of 1906 (supra).

It is objected that no proof was presented in support of this allegation of the amended answer.

In the first instance this was set up in the cross-bill which was dismissed. We submit that it was proper matter to be set up in the cross-bill as a ground for affirmative relief, and a decree pro confesso was prayed and denied.

It was again set up in the amended answer on which the case went to trial, also as ground for affirmative relief, i. e., that the deed be declared null and void. This amended answer was under oath, the oath not having been waived by the bill. We insist that as this allegation was not set up as new matter in answer, but, under the ruling of the lower court on the motion to dismiss the cross-bill, was set up as a counterclaim or offset, on which affirmative relief was prayed, as provided by Equity Rule 30, the plaintiff, under Equity Rule 31, should have replied thereto, and that in default of such reply, the verified answer, so far as the setoff or counterclaim on which the prayer for affirmative relief was based is concerned, would be evidence on the trial for

the defendant, as it would have been under the old practice when no replication was filed. But if not properly a part of the cross-bill, then it was a part of the amended verified answer, and the allegation being evidence, it was not denied by evidence, and therefore stands proved.

Campbell v. *Northwest Eckington Co.*, 229 U. S. 561, 574, 579;
Vigol v. *Hopp*, 104 U. S. 441;
Kenne'y v. *Custer*, 174 Fed. 972;
Jacobs v. *Van Sickle*, 127 Fed. 62;
1 *Whitehouse Equity Practice*, Sec. 282.

For this reason we submit that upon the pleadings the Trial Court should have found for the defendant on this ground, and declared the deed null and void, and the Circuit Court of Appeals did not err in so finding.

In connection with this allegation of the answer, and as evidence tending to support it, it is a remarkable circumstance that in every Notarial document introduced in evidence in this case which was executed before either the Notary or his son, Francisco Soriano appears to have been one of the witnesses. The first is the $4600 mortgage, executed July 29, 1909 (R. p. 82); the second is the power of attorney from Landron's wife to Landron, executed October 27th, 1909, which appears at length in Defendant's Exhibit E (R. p. 33); the third is the $1700 mortgage from Landron to the Bank, executed December 3rd, 1912 (R. p. 84), and the last is the deed from Landron to Wilcox (R. p. 34). This, in itself, is certainly remarkable. The same man acts as witness to four deeds which happen to appear in this record, executed at different times during a period of over three years in the same Notarial office.

The Bank's argument under its Point IV proceeds entirely upon the theory that the answer was not re-

sponsive. This objection is raised for the first time in this Court. It is elementary that this Court will take the lower Court's construction of pleadings. The Trial Court held on motion of the Bank that the allegations respecting the witnesses should be included in the answer and not in a cross-bill. Defendant's cross-bill was stricken out and the answer upon which the case went to trial was thereafter filed (Bank's Brief, p. 32). Exception should have been taken by a proper motion in the Trial Court if defendant objected to the form of allegation. There is no denial by way of replication or otherwise in the record. The witnesses normally should have been called by the Bank, being in the employ of its president.

The answer is definitely responsive to the allegations of the Bank's bill seeking foreclosure upon the deed of January 14, 1913. Wilcox answers that the deed is null and void and proceeds to state the grounds of nullity. This certainly cannot be called irresponsive or new matter.

The Bank contends (Brief, p. 41) that the deed of January 14, even if viewed under Section 1998 (Sec. 20) of the Notarial Law of Porto Rico, may yet be effective as a private instrument under Sections 1191 and 1193. Section 1191 applies only to "defective instruments" and not to instruments which are null and void. In this case the instrument is not defective in the sense of Section 1191, but is absolutely null and void under Section 1998, because of the Notary's interest and because his servants were witnesses and also because of mistake and fraud. Any other construction placed on the word defective under Section 1191 would render of no avail whatever the safeguards thrown around the execution of public instruments by Section 1998. If an instrument executed by an interested Notary can be enforced, it makes little difference whether it is enforced

as a private or public document, in fact it makes no difference unless it is sought to prejudice the rightz of third parties.

The provisions of Porto Rican law respecting contracts, quoted in the Bank's Brief, are not peculiar, but set forth what is common-place in American contract law. Consent of the contracting parties did not exist in the instrument sought to be enforced in this case (Bank's Brief, p. 44).

The deed as drawn by Monserrat cannot be held to set forth the agreement between the parties, since it includes the $1700 mortgage not contemplated by the written agreement of January 13, 1913; so that appellant's contention that the Notary's incapacity would only change the nature of the document from a "public" to a "private" one is untenable. The element of consent was absent so that the deed of January 14 was void under Section 1232. Consent given by error, under violence or deceit, shall be void.

The Bank seeks to make something of the fact that Wilcox was in possession of the property. His possession was entirely consistent with his position as a mortgagee. But he was consistent from the discovery of the fraud in his position that the deed was invalid. He not only refused to pay further interest, but in the foreclosure proceedings set up his contentions in cross-bill as well as answer; and in addition he brought an independent suit against Landron to annul the deed.

The cases cited at the bottom of page 44, Bank's Brief, do not attempt to construe Section 1191 of the Civil Code of Porto Rico (R. S. Sec. 4297). In each one of the cases cited the cause of action arose from an agreement which was not embodied in a written instrument and the decision of the Supreme Court of Porto Rico in each case was simply that the absence of a written agreement does not necessarily deprive a party to such

an agreement from obtaining from the Court specific performance thereof if he can prove the nature of the agreement and the consideration by means of any other evidence. These cases would support the proposition that the preliminary agreement between Wilcox and Landron would still be enforceable at the instance of either party to the agreement were the decree of the Circuit Court of Appeals to be affirmed on this appeal.

The Bank may urge that if the deed of January 14, 1913, cannot be enforced as a private contract, it still has a right to proceed upon the agreement of January 13, 1913, which was excluded by the Trial Court. This could not be done for the reason that the agreement was merely an executory contract and until the deed therein contemplated was executed no third parties could enforce it.

POINT IV.

The $1700 mortgage is also null and void as usurious.

The consideration for the $1700 mortgage was developed on cross-examination of the complainant's first witness, the treasurer of the Bank (p. 49 transcript). The greater part of the $1700 was unpaid interest on the first mortgage of $4600, estimated by the treasurer from a memorandum, not from the books of the Bank, to have been about $1480. The interest on the first mortgage was one per cent. per month, or twelve per cent. per annum, payable every four months, in advance. The mortgage for $1700 also bore the same high rate payable in the same manner. By this operation the Bank secured the payment of all of the interest to December 3, 1912, on the first mortgage by a lien on the property (if the mortgage was recorded) and also secured twelve per cent. interest per annum on this interest.

The laws with regard to interest in Porto Rico are clear. They are set forth in the Compiled Statutes of Porto Rico, Sections 4171-4182. Section 4172 provides for no greater interest than twelve per cent. per annum by contract, Section 4174 excepting from this provision only loans made by licensed pawnbrokers, or bottomry and respondetia bonds and contracts. Section 4175 provides as follows:

> "No person except as authorized by Section 3 of this Act [Sec. 4174 Compiled Statutes] shall demand or receive, directly or indirectly, any money or goods, at any greater rate of interest for the loan or extension of time of said loan, than the rate provided for herein.
>
> Any contract wherein or whereby there is reserved, accepted or secured, any greater rate of interest than is allowed by this Act, is utterly void for all purposes, insofar as the interest is concerned; and a Court of competent jurisdiction may enjoin the collection of said interest, and any proceeding to enforce such contract shall be void, in so far as it refers to the interest."

Section 4182 of the Compiled Statutes, Art. 1076 of the Civil Code of Porto Rico, also provides:

> "Interest due shall earn legal interest, from the time it is judicially demanded, even if the obligation should have been silent on this point."

"Legal interest," as fixed by Section 4172 of the Compiled Statutes (Sec. 1 of Law of Interest, approved March 1, 1902, as amended by the Act approved March 12, 1903, p. 108, Laws of 1903) is fixed at six per cent. per annum, the parties, by special agreement being allowed to contract for the payment of twelve per cent.

Sec. 4172, Com. Stat., Sec. 1, Law 1902 as amended 1903.—"That in the absence of an agreement in writing entered into and executed at the time, the rate of interest upon the loan or forebearance of money or goods or upon any variety of obligation or contract or upon unpaid judgments, shall be at the rate of six ($6) dollars annually, on each one hundred ($100) dollars or upon its equivalent of value and at the same rate for a greater or less sum or for a longer or shorter period. PROVIDED, however, that no rate of interest shall be fixed by special agreement in excess of twelve ($12) dollars on each one hundred ($100) dollars or upon its equivalent of value. Within the limit here defined it shall be lawful to discount bills and notes and other similar obligations."

The mortgage of December 3, 1912, which attempted to secure to the Bank not only the payment of the interest due on the $4600, but also the interest on that interest, in view of these provisions is clearly void. It amounts to nothing more nor less than an attempt to secure a greater rate than twelve per cent. on the mortgage for $4600. If it sued for the interest due on the $4600, it could only have secured six per cent. on the amount from the time the complaint was filed, but not before. The act cited (Sec. 4175) imposed on the lender the penalty of the loss of all the interest, where he attempts to evade the law, and makes any proceeding to enforce the contract void, insofar as it refers to the interest. The proceeding to enforce this mortgage should not have been allowed to proceed in view of the Bank's evidence with regard to the nature of the consideration for the mortgage.

The Mortgage Law gave to the mortgage creditor the following rights, only, with regard to unpaid interest:

Art. 114. (Sec. 6798 Com. Stat.) "A mortgage created in favor of an interest paying debt shall secure to the prejudice of third persons, besides the capital, only the interest for the two years last past and such part as is due for the current year."

Art. 115. (Sec. 6799 Com. Stat.) "After three years have elapsed from the time the loan began to accumulate interest which remains unpaid, the creditor may demand that the mortgage created be enlarged on the same mortgaged property, for the purpose of securing the interest corresponding to the first of said years, but only in case the obligation to pay part of the interest is past due and the debtor has failed to satisfy it.

If the creditor makes use of his right after three years have elapsed, he may demand that a mortgage be extented to cover all the interest which at the time of said extension was not covered by the first mortgage; but this can in no case prejudice a mortgage created in favor of a person who had previously and after the two years acquired an interest in the mortgaged property." (Our translation.)

The only way in which these sections can be construed so as to stand in connection with the present Interest Law, and which we submit is their proper interpretation under any circumstances, is this. The mortgage created no lien on the real property for any interest beyond the two last years and the current year, but provides that by a subsequent contract between the parties a lien on the property to secure the payment of unpaid interest might be created. The amount of interest, however, is not to draw interest. The law nowhere intimates that this extension of the mortgage shall secure the payment of interest on the interest, but merely shall create a lien for the unpaid interest. The Bank could have obtained

from Landron such a mortgage if three years had elapsed from the time the unpaid interest began to accumulate, for the whole amount of the interest due, or if the three years had not wholly elapsed only for interest corresponding to the first of such years. But note that the law expressly provides that this could not be done if it would prejudice the rights of a mortgage creditor acquired after the two years. This was the trouble with the Bank's taking an extension of the Landron mortgage to secure the payment of unpaid interest. Sweet & Wilcox had acquired a mortgage on the property after the two years, and an extension of the mortgage to secure the unpaid interest would not affect them. Furthermore such an extension mortgage, as we have seen would *not* carry interest on the interest. Hence the plan of making a document that would appear to be a mortgage to secure cash actually paid to the debtor by the creditor Bank.

By the Interest Law above set forth, the Bank, for its cupidity is penalized by the loss of interest. This does not mean the interest on the $1709; it means the entire interest on the $4600 represented in the $1700 transaction, and, of course, the interest on that interest, for this is the usurious transaction. And since the plaintiff, the only party who could tell the Court exactly how much of the $1700 was interest, has failed to do so clearly, the Court cannot estimate the amount but must conclude that the whole amount represents interest.

For all of which reasons we respectfully submit that no decree should have been entered as to the mortgage for $1700 nor for the interest thereon nor for costs and attorney's fees.

The argument concerning usury in the Bank's Brief (pp. 61-62) is based entirely upon construction of state statutes making voidable only the excess interest and not the total interest. The Porto Rican usury statute is so drawn as to void all interest.

Answering Point V. Bank's Brief.

The Bank (p. 54) complains of the order of dismissal of the Court of Appeals, saying that in any event it was entitled to a foreclosure of the $4600 mortgage. Wilcox, as a second mortgagee was entitled to have an opportunity to protect his lien by buying in on a proper foreclosure suit or by paying only the amount of lawful claims ahead of his. As a practical matter, the Court knows that his equities cannot be protected in the present litigation by affirming the foreclosure decree and amending it. Equity demands that Wilcox and the Bank be placed in *statu quo ante* January 14, 1913. This is the effect of the decree of the Circuit Court of Appeals. We are not here concerned with Landron's interest. The Bank, if it is so advised, may hereafter bring such proceedings as it sees fit to foreclose its $4600 mortgage.

Answering Point VI. Bank's Brief.

The District Court erred in dismissing the Bill of Review filed by Wilcox after he had procured a decree cancelling the deed of January 14, 1913, upon which the Bank's bill was brought. The District Court and the Bank both seem to feel that Wilcox committed a tactical blunder in dismissing the cancellation suit as to the Bank, taking a *pro confesso* decree against Landron. The Bank had no right except by subrogation or its equivalent, but it was a party in interest and had an opportunity to stay in that litigation as an intervenor or otherwise. Wilcox could not have forced it out, had the Bank desired to litigate the issues raised. Upon cancellation of the deed as against Landron the foundation for the Bank's foreclosure decree was taken away.

CONCLUSION.

We submit that this appeal should be dismissed (with costs) for lack of jurisdiction and, in any event, the decree of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,

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October 4, 1920.